IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE MANTAKOUNIS t/a MANTIS PAINTING CO.	:	CIVIL ACTION
v.	:	
AETNA CASUALTY & SURETY CO. d/b/a TRAVELERS-AETNA PROPERTY & CASUALTY CORP.	:	NO. 98-4392

MEMORANDUM AND ORDER

J. M. KELLY, J. **AUGUST 10, 1999**

Presently before the Court is Defendant Aetna Casualty and Surety Company's ("Aetna") Motion for Summary Judgment. Mantakounis filed a five-count complaint on August 21, 1998, alleging breach of contract, breach of fiduciary duty, bad faith under 42 Pa. Cons. Stat. § 8371 (1999), violations of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), and wrongful use of civil proceedings under the Dragonetti Act, 42 Pa. Cons. Stat. § 8351. Aetna, Mantakounis' insurer under a commercial general liability policy, moves for summary judgment. For the reasons that follow, Aetna's motion is granted in part and denied in part.

I. Background

In June 1988, Mantakounis purchased a commercial general liability policy from Aetna for his commercial painting business. The policy provided coverage for any money Mantakounis would be required to pay as a result of property damage. The policy required Mantakounis to pay a $250 deductible for each property damage claim.

On June 8, 1989, Mantakounis was informed of an overspray that occurred while he was painting outdoors in Delaware City, Delaware, which may have damaged cars parked in a lot approximately one mile from the job site. Although the parties have not defined "overspray" in

their briefs, the Court understands it to be result of spillage during outdoor spray painting. Mantakounis reported the overspray to Aetna. Aetna assigned the case to Eileen Tolan, who visited the site on June 20, 1989. Two days later, she sent a letter to Mantakounis reporting damage to at least 300 cars, estimating Mantakounis' obligation to be $75,000, and warning him of the possibility of more claims. Ultimately, 433 cars were allegedly damaged and for which claims were filed against Mantakounis' policy. Aetna assigned one claim number for all the claims made against Mantakounis' policy.

On October 15, 1991, after Mantakounis refused to pay, Aetna brought suit in Delaware Superior Court to recover $108,250, a sum equal to $250 for each of the 433 cars allegedly damaged in the overspray. A claims representative's notes dated March 6, 1992, indicate Aetna was informed that more information and documentation was needed for the suit against Mantakounis. Tolan was first deposed on May 5, 1992. On May 21, 1992, Aetna's attorney, Richard D. Becker, sent a letter to Aetna's subrogation department stating, "at this point, it is not clear to me that the operations caused overspray to all of the vehicles." (Pl.'s Resp. Ex. 6.) On July 16, 1992, Tolan was again deposed and, according to the Complaint in the present action, Mantakounis then learned of Tolan's failure to properly investigate or adjust the alleged claims.

Mantakounis moved for summary judgment in the Delaware suit, arguing that Aetna had breached their fiduciary duties to him and that under his policy, he was required to pay only one $250 deductible per occurrence. Judge Herlihy of the Delaware Superior Court denied the motion. After a non-jury trial in August 1997, Judge Barbiaz found that Aetna had not sustained its burden of proving that Mantakounis was responsible for the $250 deductible for each of the 433 claims that Aetna paid. On August 20, 1998, two years after the resolution of the Delaware

action, Mantakounis filed this suit in the Eastern District of Pennsylvania.

II. **Discussion**

A. Legal Standard

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48. The summary judgment standard requires the issue to be genuine, that is, one where a reasonable jury, based on the evidence presented, could return a verdict for the nonmoving party with regard to that issue. See id. In addition, the disputed fact must be "material," meaning it might affect the outcome under the substantive law. See Boyle v. County of Allegheny, 139 F.3d 386, 393 (3d Cir. 1998). When deciding a motion for summary judgment, the Court must draw all inferences in the light most favorable to the nonmoving party without weighing the evidence or questioning the witnesses' credibility. See id. The movant has the burden of demonstrating the absence of a genuine issue of material fact, while the nonmovant must establish the existence of each element for which it bears the burden of proving at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When an examination of the record as a whole reveals sufficient evidence for a rational trier of fact to return a verdict in favor of the nonmovant, a genuine issue of material fact exists and summary judgment should be denied. See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio

Corp., 475 U.S. 574, 587 (1986).

B. Count I: Breach of Contract

In Count One of his Complaint, Mantakounis alleges Aetna breached its contract with him by failing to properly investigate whether he was the cause of any property damage and whether the alleged claims against his policy were legitimate. Aetna urges the Court to grant summary judgment in its favor on the ground that the claim is barred by Pennsylvania's four-year statute of limitations for breach of contract actions. See 42 Pa. Cons. Stat. Ann. § 5525 (West 1999). Aetna contends that the breach of contract alleged by Mantakounis occurred in 1989, or at the latest, on July 16, 1992, when Tolan was deposed. Mantakounis argues the contract was breached continually, from 1989 to 1997. To determine whether the statute of limitations has run, the Court must determine the latest date a reasonable jury could find the breach of contract claim arose.

A cause of action arises upon "the occurrence of the final significant event necessary to make the claim suable." Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 372 F.2d 18, 20 (3d Cir. 1966), cert denied, 387 U.S. 930 (1967). Pennsylvania courts have developed tolling principles to "ameliorate the sometimes harsh effects" of the statute of limitations. Cathcart v. Keene Ind. Insulations, 471 A.2d 493, 500 (Pa. Super. Ct. 1984). Determination of the actual accrual date of the action, is subject to the "discovery rule," defined by the Third Circuit as "whether 'the plaintiff knows, or reasonably should know: (1) that he has been injured, and (2) that his injury has been caused by another party's conduct.'" Urland v. Merrell-Dow Pharm., 822 F.2d 1268, 1271 (3d Cir. 1987) (quoting Cathcart, 471 A.2d at 500). "[A] plaintiff could not have known of his injury and its cause if, 'despite the exercise of due

diligence,' he was unable to ascertain the fact of a cause of action." Cowgill v. Raymark Indus., Inc., 780 F.2d 324, 330 (3d Cir. 1986) (quoting Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983)).

Here, the question is whether Mantakounis knew or should have known on or before August 20, 1994, whether Aetna failed to properly investigate the cause of any property damage or the legitimacy of claims made against his policy. Mantakounis evidenced some knowledge of a potential claim by raising Aetna's failure to adequately investigate the claims against his policy as a defense in the Delaware action. Aetna Cas. & Surety Co. v. Mantakounis, No. CIV.A. 91C-10-142, 1996 WL 190046, at *2 (Del. Super. Ct. March 5, 1996). In fact, in support of his motion for summary judgment he specifically raised the more narrow claim that Aetna breached its duty to him by using adjusters and firms not properly licensed in Delaware. Id. The motion for summary judgment in the Delaware action was filed on November 1, 1995, however, and nothing has been provided by Aetna to indicate Mantakounis' knowledge prior to that date. Although the record tends to show the deposition of Eileen Tolan would have provided Mantakounis with sufficient facts on which to base a cause of action, the Court has not been provided with her testimony. The Court can not rule as a matter of law that Mantakounis knew or should have known by or before August 1994 of salient facts on which the breach of contract claim is based. Aetna's motion for summary judgment on the breach of contract claim is accordingly denied.

C. Count II: Breach of Fiduciary Duty

Count Two of the Complaint alleges breach of a fiduciary duty in Aetna's failure to promptly, swiftly, and reasonably investigate and evaluate claims against his policy. Breach of

fiduciary duty is tortious conduct, subject to a two-year statute of limitations period. 42 Pa. Cons. Stat. Ann. § 5524(7) (West 1999).[1] To determine whether the statute of limitations has run on Mantakounis' cause of action for breach of fiduciary duty, the Court must determine whether the action accrued on or before August 20, 1996. Again, Mantakounis' action arose when he had sufficient facts on which to base and institute a suit. See, e.g., Pocono, 468 A.2d at 471.

In the Delaware action, Mantakounis raised the defense that "Aetna breached its fiduciary duties by not making an individual determination whether each of the 433 vehicles was damaged by his painting operations." Aetna, 1996 WL 190046, at *2. Because Mantakounis submitted his motion to the Superior Court of Delaware on November 1, 1995, The Court is satisfied that he had sufficient knowledge on which to base this claim prior to August 1996.[2] Summary judgment is granted in favor of Aetna because the breach of fiduciary duty claim is barred by the statute of limitations.

D. Count III: Bad Faith Action

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[1] The following actions and proceeding must be commenced within two years:

* * *

(7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this chapter.

Id.

[2] Mantakounis advances the argument that the April 1997 deposition of John Quinn and the other facts about Aetna's investigation Mantakounis acquired through discovery precludes summary judgment against him. Although this additional information would have assisted Mantakounis in his cause of action, he had sufficient facts to allege breach of fiduciary duty prior to his receipt of the additional information.

Count Three of Mantakounis' Complaint alleges Aetna's action in this matter were "wanton, willful, negligent, and grossly negligent with the intend (sic) to deprive, delay or compromise his rights under the policy . . . and further to attempt to extort from him a deductible for each vehicle which was allegedly damaged . . . ." (Pl.'s Compl. ¶ 59.) Mantakounis contends that Aetna's conduct, particularly the alleged breach of fiduciary duty and the initiation of the law suit against him, violate 42 Pa. Cons. Stat. Ann. § 8371 (West 1999).[3] Summary judgment on the § 8371 bad faith claim is granted because it is barred by the statute of limitations.

Because the statute of limitations for a bad faith action has yet to be addressed by Pennsylvania's highest court, the Court must predict how the Pennsylvania Supreme Court would decide the issue if it were presented with the problem. See, e.g., Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1046 (3d Cir. 1993), cert. denied sub nom. Upp v. Mellon Bank, 510 U.S. 964 (1993) ("[I]t is critical that the federal court do all within its power to view the problem before it as a state court would. . . ."). The Eastern District of Pennsylvania has issued contradictory rulings on the appropriate statute of limitations for § 8371 claims. Compare Friel v. Unum Life Ins. Co. of Amer., No. CIV.A. 97-1062, 1998 WL 800336, at *7 (E.D. Pa. Nov. 17, 1998) (granting defendant's motion for summary judgment because bad faith claim is time barred by two-year statute of limitations), and Nelson v. State Farm Mut. Auto. Ins. Co., 988 F. Supp.

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[3] In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take the following actions:
(1) Award interest in the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
(2) Award punitive damages against the insurer.
(3) Assess court costs and attorney fees against the insurer

Id.

527, 534 (E.D. Pa. 1997) (holding the Pennsylvania Supreme Court would conclude that a bad faith action is a tort action with a two-year statute of limitations under 42 Pa. Cons. Stat. Ann. § 5524(7)), with Kosierowski v. Allstate Ins. Co., No. CIV.A. 98-5221, 1999 WL 388215, *11 (E.D. Pa. June 4, 1999) (assuming for the purposes of a summary judgment motion that the statute of limitations in a bad faith action is six years), and Woody v. State Farm Fire & Cas. Co., 965 F. Supp. 691, 695 (E.D. Pa. 1997) (holding the Pennsylvania Supreme Court would apply a six-year statute of limitations for § 8371 claims). The Court is persuaded by Judge Dalzell's opinion in Nelson, which sets forth strong arguments supporting its conclusion that a two-year statute of limitations is appropriate. First, bad faith causes of action have historically been treated as torts. See, e.g., id. (citing D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 431 A.2d 966, 970 (Pa. 1981), aff'd, 431 A.2d 966 (Pa. 1981) (recognizing that other courts have created the "new tort" in bad faith, but reserving recognition of the cause of action for the legislature) (citations omitted)). Second, the nature of the bad faith action, which is a separate and independent tort from a contract claim, is based upon standard of conduct imposed by society and is therefore similar to a tort. Id. at 532-33. Third, by 1997 the majority of state supreme courts recognize bad faith breach of an insurance contract as a common law tort. Id. at 533. The Court agrees with Judge Dalzell's prediction that the Pennsylvania Supreme Court would conclude an action under section 8371 would be subject to a two-year statute of limitations.

Accordingly, for Mantakounis to survive this motion for summary judgment, some of the alleged bad faith conduct must have occurred after August 20, 1997. The allegations made by Mantakounis, however, concern Aetna's conduct between 1989 and, at the latest, 1992. (Pl.'s Compl. ¶¶ 48-60.) As Mantakounis has failed to allege any conduct occurring after 1992, his bad

faith claim is time barred and Aetna's motion for summary judgment as to that claim therefore is granted.

E. Count IV: Unfair Trade Practices and Consumer Protection Action

The fourth Count of Mantakounis' complaint purports to state violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Cons. Stat. Ann. § 201- 9.2 (West 1999), pointing to Aetna's allegedly inadequate investigation and its attempts to force Mantakounis to pay deductibles for which he was not responsible. Aetna argues the claim is barred by the statute of limitations, and alternatively, that Mantakounis has failed to state a claim. The Court will grant summary judgment for Aetna on grounds that the UTPCPL is inapposite.

The Pennsylvania UTPCPL protects "any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss . . . may bring a private action. . . ." Id. An improper investigation by an insurer is generally actionable under the UTPCPL. See Smith v. Nationwide Mut. Fire Ins. Co., 935 F. Supp. 616, 621 (W.D. Pa. 1996) (denying motion to dismiss UTPCPL claim for insurer's alleged improper post-loss investigation); Parasco v. Pacific Indem. Co., 870 F. Supp. 644, 648 (E.D. Pa. 1994) (finding plaintiffs' UTPCPL claim alleging an unfair and nonobjective investigation falls within the purview of the Act, but dismissing claim on other grounds). Unfortunately for Mantakounis, where the insurance is purchased for commercial purposes, the UTPCPL is inapplicable. See, e.g., Waldo v. North Am. Van Lines, Inc., 669 F. Supp. 722, 725-26 (W.D. Pa. 1987). Mantakounis' insurance policy was purchased for the sole purpose of insuring his business. Therefore, his UTPCPL claim is not actionable and summary judgment is

granted in favor of Aetna.[4]

F. Count V: Wrongful Use of Civil Process

Count Five of Mantakounis' complaint alleges wrongful use of civil process, a violation of the Dragonetti Act, 42 Pa. Cons. Stat. Ann. § 8351. Aetna seeks summary judgment, arguing it had probable cause to initiate civil proceedings. Mantakounis notes the May 1992 letter from Aetna's attorney to its subrogation department indicating his doubt that all of the alleged damage was caused by Mantakounis. In addition, he points to the Aetna representative's running notes in which one representative in March 1991 wrote, "[d]oes Rick have all the necessary proof?," and another representative, one year later wrote, "Rick needs more documentation." Further, there is some indication that neither the claims department nor the subrogation department had a copy of the policy and had not interpreted it at the time of suit. Mantakounis' response points to additional facts from which a reasonable jury could infer that Aetna lacked probable cause for initiating the Delaware action. Because there is a genuine issue as to one of the elements of the § 8351 action summary judgment must be denied.

An Order follows.

[4] In view of this analysis, the Court will not address Aetna's statute of limitations argument.

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GEORGE MANTAKOUNIS	:	CIVIL ACTION
t/a MANTIS PAINTING CO.	:	
v.	:	
	:	
AETNA CASUALTY & SURETY CO.	:	
d/b/a TRAVELERS-AETNA	:	
PROPERTY & CASUALTY CORP.	:	NO. 98-CV-4392

ORDER

AND NOW, this 10th day of August, 1999, in consideration of Defendant Aetna Casualty and Surety Company's Motion for Summary Judgment (Document No. 10), Plaintiff George Mantakounis' Response, Aetna's Reply, and the briefs and exhibits offered by the parties, it is hereby **ORDERED**:

1. Defendant Aetna's motion for summary judgment is **GRANTED IN PART**; judgment is entered in favor of Aetna Casualty and Surety Company and against Plaintiff George Mantakounis on his claims of breach of fiduciary duty, violation of § 8371 bad faith, and violation of § 8351 Unfair Trade Practices and Consumer Protection Law; and

2. Defendant Aetna's motion for summary judgment is **DENIED** as to Plaintiff Mantakounis' breach of contract and wrongful use of civil procedure claims.

BY THE COURT

JAMES McGIRR KELLY, J.